STATE OF MICHIGAN

COURT OF APPEALS

In re A. L. LICARI, Minor.

UNPUBLISHED
May 19, 2015

No. 324214
Monroe Circuit Court
Family Division
LC No. 13-022925-NA

Before: HOEKSTRA, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Respondent father appeals as of right from a dispositional order placing the child in the temporary custody of the court after an adjudication bench trial regarding respondent. For the reasons explained in this opinion, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Shortly after A.L.'s birth on March 19, 2013, petitioner filed a temporary custody petition that included allegations only against the child's mother. On March 27, 2013, the mother made admissions and the court entered an order of adjudication, making A. L. a temporary court ward. After DNA testing revealed respondent was the child's biological father, he was recognized as the child's legal father and appointed counsel. Respondent agreed to participate in a case service plan. During the course of respondent's participation in a case service plan, concerns began to surface about respondent's parental fitness.

As a result, in light of *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014), on June 17, 2014, petitioner filed a temporary custody petition against respondent. Following a preliminary hearing, the trial court authorized the petition based on allegations involving domestic violence and respondent's mental health issues which impacted his ability to parent. An amended petition, involving an additional recent instance of domestic violence against A.L.'s mother, was authorized on July 28, 2014. An adjudication bench trial relating to respondent was held on September 12, 2014, following which the trial court assumed jurisdiction over A.L. with respect to respondent.

Respondent now appeals to this Court as right. Respondent challenges the trial court's authorization of the petition, the adjudication through a bench trial as opposed to a jury trial, the trial court's evidentiary decisions involving the qualification of an expert, the trial court's exercise of jurisdiction following the adjudication trial, and the effectiveness of his trial counsel.

II. AUTHORIZATION OF THE PETITION

Respondent first contends that the trial court reversibly erred by authorizing the petition for temporary custody against him. In particular, respondent argues that the trial court erred by relying on the testimony of caseworker Kelly McNicol who did not have personal knowledge of the allegations set forth in the petition as required by MRE 602. Respondent also argues that her testimony was irrelevant under MRE 402. In addition, respondent argues that the trial court failed to determine that reasonable efforts had been made to prevent removal, and that the trial committed a number of procedural errors at the preliminary examination.

Child protective actions consist of a series of proceedings, including a preliminary hearing at which the court may authorize a petition for removal of a child from his or her home. *In re Mason*, 486 Mich 142, 154; 782 NW2d 747 (2010). "The court may authorize the petition upon a showing of probable cause that [one] or more of the allegations in the petition are true and fall within the provisions of [MCL 712A.2(b)]." MCL 712A.13a(2). See also MCR 3.965(B)(11).[1] "The preliminary hearing is governed by MCL 712A.13a and corresponding provisions of MCR 3.965." *In re Rood*, 483 Mich 73, 95; 763 NW2d 587 (2009). Notably, the Michigan Rules of Evidence do not apply, other than those with respect to privileges, when the court is deciding whether to authorize a petition. MCR 3.965(B)(11).

On appeal, a trial court's findings of fact in a child protection proceeding are reviewed for clear error. *In re Mason*, 486 Mich at 152. "A finding is 'clearly erroneous' if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id*. (quotations and alterations omitted).

In this case, respondent's claim that the trial court erred in finding probable cause to authorize the petition is without merit. Although caseworker McNicol was newly assigned to the case, the record shows that she was familiar with the case. She had been provided case information from the family counseling caseworker and from the children's services caseworker. The information she had to provide at the preliminary hearing was not irrelevant and, given that the rules of evidence did not apply, McNicol did not need personal knowledge of respondent's actions or issues to testify about them. Moreover, there was additional evidence, apart from McNicol's testimony, to establish probable cause to authorize the petition. The court noted that it authorized the petition based on allegations 10 through 12, which involved respondent's inability to provide a suitable home because of his domestic violence history with the child's mother. The court took judicial notice of its file and had probable cause to authorize the petition based on its own record of these domestic violence incidents. The court also based its decision to authorize the petition on allegation 13, which involved respondent's mental health issues. Respondent's psychological evaluation, dated July 16, 2013, found that his difficulties with

[1] MCR 3.965 has been recently amended and the numbering of certain subsections changed as a result. See MCR 3.965, as effective March 25, 2015. In this opinion, we rely on the version of MCR 3.965 in effect at the time of respondent's preliminary hearing. See MCR 3.965, as effective October 2, 2013.

cognitive and emotional control were matters of concern in relation to parenting. In a family team meeting on July 10, 2013, respondent acknowledged seeking treatment with Team Mental Health because of a diagnosis of schizoaffective disorder. Given respondent's history of domestic violence and mental health issues, there was probable cause to authorize the petition.

Respondent also argues that the trial court failed to make contrary to the welfare findings under MCR 3.965(C)(3) or to determine that reasonable efforts were made to prevent removal of the child from respondent's care as required by MCR 3.965(C)(4). This claim is unsupported by the record. The court specifically found that placement with respondent did not serve the best interests of the child and indicated that it did not find cause to change the child's placement. Toward the conclusion of the hearing the court inquired of McNicol, "Is it contrary to the child's welfare to be in the home of the father?" McNicol answered that it was due to the discord in the household, the fact that law enforcement had come to the home multiple times, and that the child's mother was living in the home but had not completed her treatment plan. McNicol further indicated that concerns about respondent's mental health and alcohol abuse also supported a contrary to the welfare finding. Similarly, the trial court asked McNicol about the reasonable efforts that were made for respondent, which included substance abuse testing and a domestic violence group. After taking judicial notice of a report dated May 13, 2014, which included a progress report regarding respondent's participation in services, the court specifically found that reasonable efforts had been made to prevent the child's removal. Ultimately, the trial court expressly stated that it was contrary to the welfare of the child to be in respondent's home given the testimony presented and that reasonable efforts had been made to prevent removal as evinced by the last case service report.

Respondent further contends that the court made many procedural errors during the preliminary hearing. Because respondent did not raise any of the alleged procedural defects in the trial court when the court was considering whether to authorize the petition, this issue was not preserved. Unpreserved claims are reviewed for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008).

Respondent argues that the trial court did not read the allegations in the petition out loud and respondent did not waive the reading of them. According to MCR 3.965(B)(4), the court must read the allegations in the petition in open court, unless waived. Although the trial court never read the petition out loud, and there is no evidence respondent waived such a reading, respondent has not shown that his substantial rights were affected by this error. Respondent received a copy of the petition pursuant to MCR 3.920. Moreover, at the onset of the hearing, the court noted that allegations 10 to 13 were of significance. During the hearing, caseworker McNicol summarized the allegations against respondent. Respondent makes no argument that he was unaware of the allegations and he has not shown prejudice arising from the trial court's failure to read the allegations out loud.

Respondent's next procedural claim, that he was not advised of the right to trial by jury as required by MCR 3.965(B)(7), is unsupported by the record. Contrary to respondent's claim, the court did advise him of the right to trial before a jury when the trial court inquired, "Is there any request for a jury trial in this matter?" Hearing no request for a jury trial, the court indicated: "Okay, we will proceed with the bench trial." Because the court's question informed respondent that the case could be heard by a jury, respondent's claim is without merit. Moreover, given that

respondent later requested a jury trial, he was clearly aware of this right and has thus failed to show prejudice.

Respondent further argues that he was not given an opportunity to deny or admit the allegations and make a statement of explanation. This claim is unsupported by the record. According to MCR 3.965(B)(8), the court "shall allow the respondent an opportunity to deny or admit the allegations and make a statement of explanation." Here the court gave respondent this opportunity. After McNicol had begun to testify, the court indicated that it needed to decide whether the child could be placed with respondent. The court asked respondent's attorney whether respondent wished to proceed with the preliminary hearing, noting that it had heard testimony that could be used but that respondent would also have an opportunity to respond, and to present evidence, if he wished to continue with the hearing. Respondent's attorney stated that he wanted to proceed, but asked that the court use its discretion without anything further from respondent and to dismiss the petition. The record does not show that respondent was denied an opportunity to speak. Moreover, at the conclusion of the hearing the court asked whether there were any other issues it could address but respondent again did not speak up. Thus, respondent's claim that he was not given an opportunity to respond to the allegations is without merit, and he fails to explain how any purported failure in this regard affecting the outcome of the proceedings.

Finally, respondent argues that no inquiry was made regarding the identity of relatives who might be available to provide care. According to MCR 3.965(B)(13), the court must inquire of the parent, guardian, or legal custodian regarding the identity of relatives of the child who might be available to provide care. In this case, the child had been in care since March 2013, meaning that her placement had already been addressed. The court specifically found that the facts necessitating the child's placement had not changed and that therefore there was no cause to change the placement. Respondent makes no effort to explain how he was prejudiced by the trial court's failure to specifically ask respondent about relatives. Thus, respondent has not shown any plain error affecting his substantial rights.

III. RESPONDENT'S RIGHT TO A JURY TRIAL

Respondent next argues that the trial court deprived him of his right to an adjudication trial before a jury. Respondent contends that he never waived his right to a jury trial and that the trial court nonetheless improperly vacated the jury trial and held a bench trial.

A parent is "constitutionally entitled to a hearing on their fitness," and pursuant to that right, "MCL 712A.17(2) affords him [or her] the statutory right to demand a jury because a parental-fitness hearing qualifies as a noncriminal hearing under the juvenile code." *In re Sanders*, 495 Mich at 418 n 15 (emphasis and quotations omitted). This is true for each parent. *Id.* at 421-422. However, the right to a jury trial in a civil action is permissive and not absolute. Const 1963, art 1, § 14; *Marshall Lasser, PC v George*, 252 Mich App 104, 106; 651 NW2d 158 (2002). Further, a party may waive a jury trial demand by agreement "in writing or on the record[.]" MCR 2.509(A)(1). The rule that a party may waive a previously asserted demand for a jury "on the record," "encompasses an expression of agreement implied by the conduct of the parties." *Marshall Lasser*, 252 Mich App at 107. Thus, for example, failure to object to a bench trial and voluntary participation in the proceedings can amount to waiver of a demand for a jury trial. See *Davis v Chatman*, 292 Mich App 603, 616-619; 808 NW2d 555 (2011). Likewise,

failure to appear, even if the right to a jury trial has been previously secured, can be considered a waiver of a jury trial. *Marshall Lasser*, 252 Mich App at 108. To determine whether the conduct of the parties justifies the inference of a waiver, we look to the totality of the circumstances, cognizant of the importance of jury trials in our system of justice. *Id.*

In this case, as noted above, respondent did not make a demand for a jury trial at the preliminary hearing when the trial court originally indicated that it would schedule the matter as a bench trial. Respondent made a demand for a jury some weeks later on July 7, 2014. At that time, the trial court honored respondent's request and rescheduled the case for a jury trial in August of 2014. However, on the day and time set for a jury trial respondent failed to appear in court without any explanation for his absence. Respondent's attorney indicated that he could not state a position regarding rescheduling a bench trial because his client was not there to consult. The court determined that it would reschedule the case as a bench trial and that it would reconsider the issue if one of the parties thought this was in error. The court indicated that it wanted to give respondent every opportunity if he had a meritorious defense for failing to appear, but that the court would not proceed with a jury trial in his absence.[2] The court vacated the jury trial and rescheduled the case for a bench trial.

Respondent made no objection to the court's decision to conduct a bench trial rather than a jury trial, nor did respondent at any time thereafter attempt to reiterate his request for a jury trial. When respondent was given the chance to speak at the onset of the bench trial, he never requested a jury or questioned the jury's absence. Instead, respondent appeared for the bench trial, he was represented by counsel, and he participated in the proceedings at which no jury was present. Given respondent's failure to appear for a jury trial, his failure to thereafter object to a bench trial, and his voluntary participation in the bench trial proceedings, it is clear under the totality of the circumstances that respondent impliedly waived his demand for a jury trial "on the record" by virtue of his conduct. See *Davis*, 292 Mich App at 616-619; *Marshall Lasser*, 252 Mich App at 107-108. He cannot remain silent at trial and then attempt to overturn the results by raising the issue on appeal. *Marshall Lasser*, 252 Mich App at 109. Because respondent waived his demand for a jury trial, the trial court did not err by failing to hold a jury trial.

IV. QUALIFICATION OF EXPERT WITNESS

[2] Respondent notes on appeal that, pursuant to MCR 3.972(B)(1), the trial court could have conducted proceedings in respondent's absence and he notes that his counsel requested that the matter proceed to trial on August 29, 2014 despite respondent's absence. Although it is true that this rule permits the trial court to proceed in a respondent's absence, it does not *require* the trial court to do so and it certainly does not require the trial court to conduct a jury trial when a respondent has not seen fit to appear at the place and time scheduled for that trial. Indeed, a respondent has a right to be present for the trial, MCR 3.972(B)(1), and in delaying the matter, the trial court apparently acted for respondent's benefit, specifying that "this is a very significant right that a parent has to a child and I don't want to deprive him of the opportunity to appear . . . ." We see nothing improper in the trial court's decision to delay the trial in this case in light of respondent's absence.

Respondent next argues that caseworker Julie Brda should not have been permitted to testify as an expert. In particular, respondent argues that Brda could not be qualified as an expert because he was not notified before trial that Brda was an expert witness, as required by MCR 2.401(I)(1)(b). Respondent also argues that the court abused its discretion under MRE 702 by allowing Brda to testify because she did not provide scientific, technical, or other specialized knowledge that would assist the trier of fact, and her testimony was unreliable. Finally, respondent claims Brda impermissibly testified to the ultimate issue, and that, contrary to the requirements of MRE 703, Brda's expert opinion was not based on facts and data in evidence.

The admission of expert testimony is governed by MRE 702 and MRE 703. Under MRE 702, if a witness qualifies as an expert by reason of knowledge, skill, training, experience, or education, the court may admit expert testimony, involving scientific, technical, or other specialized knowledge that will assist the trier of fact, if the testimony is "based on sufficient facts or data" and is "the product of reliable principles and methods" and if the expert "has applied the principles and methods reliably to the facts of the case." MRE 703 states that the facts or data used by the expert "shall be in evidence" or, at the court's discretion, "admitted in evidence thereafter." Because respondent did not object to Brda's testimony on the record, he must demonstrate plain error affecting his substantial rights. *In re Utrera*, 281 Mich App at 8-9.

Defendant has not demonstrated plain error in the trial court's decision to qualify Brda as an expert on the first day of trial despite petitioner's failure to provide notice. Although MCR 2.401(I)(1) requires parties to file a witness list and to identify expert witnesses, when a witness is not listed in accordance with that rule, the trial court has discretion regarding whether to prohibit the witness's testimony. See MCR 2.401(I)(2). Moreover, respondent was not prejudiced because, although Brda was not named as an expert before trial, respondent concedes on appeal that Brda was named in an amended witness list, meaning that he was notified in advance of trial that Brda would be called as a witness. Brda only gave expert testimony on the issue of the child's welfare and, given that respondent knew Brda would be testifying and knew that she was an "agency representative," this area of examination should have reasonably been anticipated by respondent such that he was able to adequately prepare for her testimony.

Contrary to respondent's argument, there was also no plain error in the trial court's qualification of Brda as an expert under MRE 702. Brda had earned a bachelor's degree in social work as well as criminal justice and psychology, and she attended ongoing training each year in the area of child protection and welfare. She also had more than nine years experience working for CPS and foster care. She had previously been qualified as an expert in the area of child protection. In light of her training, education, and experience, the trial court did not plainly err in qualifying her as an expert. MRE 702. We also do not see anything unreliable in Brda's opinion, which was based on her knowledge of child protection as well as the particular facts and data she gathered during her involvement with respondent's case. See MRE 702. Ultimately, given her background, she had specialized knowledge pertaining to child protection which would be useful to the trier of fact, and the trial court's decision to admit her expert testimony was not plainly erroneous. See MRE 702.

Furthermore, there was no plain error in allowing Brda to give expert testimony on the issue of the child's welfare, the ultimate issue in the case. Pursuant to MRE 704, opinion testimony is not objectionable merely because it embraces an ultimate issue to be decided by the

trier of fact. Thus, contrary to respondent's arguments on appeal, Brda could offer an opinion on the ultimate issue of the child's welfare. See MRE 704.

In addition, contrary to respondent's appellate arguments, Brda's testimony was not impermissibly based on facts or data not in evidence as prohibited by MRE 703. See *People v Unger*, 278 Mich App 210, 248; 749 NW2d 272 (2008). First, although an expert witness may not base his or her testimony on facts that are not in evidence, an expert witness is not precluded from basing an opinion on the expert's own personal knowledge. *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 735; 761 NW2d 454 (2008). Brda testified as both a fact witness and an expert, and she had some personal knowledge of respondent on which to base her opinion. For example, she expressed concern about respondent's anger management skills based on a conversation she described in which respondent lashed out at Brda. Her own knowledge of respondent's temper provided a nonhearsay basis for Brda's opinion. See *id.* Second, to the extent Brda's opinion was based on hearsay, for example from information provided to her by A.L.'s mother, Brda's testimony and the facts on which she based her opinion were in accord with other testimony and information received at trial. See *Unger*, 278 Mich App at 248. Accordingly, Brda's expert opinions were based on facts otherwise in evidence and therefore her testimony was not a violation of MRE 703.

Ultimately, even without Brda's expert testimony on the issue of the child's welfare, given the evidence presented at trial, the court would have reached the same conclusion—that respondent's emotional instability, alcoholism, and mental health issues made him an unfit caregiver. Thus, respondent cannot demonstrate plain error that affected his substantial rights. See *In re Utrera*, 281 Mich App at 8-9.

V. STATUTORY BASIS FOR JURISDICTION

Respondent contends that there was insufficient evidence for the trial court to assert jurisdiction over the child. Respondent first challenges the propriety of some of the evidence relied upon by the trial court. In particular, respondent argues that much of the evidence offered involved uncorroborated hearsay, that the trial court should not have conflated the adjudication with a prior motion hearing, and that the trial court effectively shifted the burden of proof to respondent by indicating that it was "very persuasive evidence" that respondent left during the trial and did not stay to "indicate why he believed his home was a safe for this child." Apart from his challenges to the evidence supposedly used by the trial court, respondent claims that evidence of criminality and violence did not demonstrate the home was an unfit place for A.L., that any failings by A.L.'s mother do not render respondent unfit as a parent, that petitioner failed to prove respondent had mental health problems or substance abuse issues, and that the trial court improperly considered conduct that occurred after the date of the petition. Asserting that there is no evidence respondent mistreated another child, respondent also argues that the trial court improperly applied the doctrine of anticipatory neglect based on the assumption that respondent might pose a risk to A.L. Respondent's various claims are without merit.

"To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction exists." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). MCL 712A.2(b) provides that a court has "[j]urisdiction in proceedings concerning a juvenile under 18 years of age found within the county":

> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk or harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . .
>
> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

Jurisdiction must be established by a preponderance of the evidence. *In re BZ*, 264 Mich App at 295. We review for clear error the findings of fact underlying the trial court's decision to exercise jurisdiction. *Id.*

In this case, there was evidence at trial that respondent was unable to provide proper care or custody for A. L. and that his home was an unfit place for A.L., thereby providing a basis for the trial court's exercise of jurisdiction. In particular, the evidence showed that respondent had a history of domestic violence with the child's mother with whom he lived. He had acknowledged mental health issues, problems with alcohol, and he had demonstrated emotional instability throughout the case. These circumstances justified the trial court's exercise of jurisdiction under MCL 712A.2(b).

In contrast, on appeal, respondent argues that there was insufficient evidence to substantiate a domestic violence claim. However, during the adjudication trial, A. L.'s mother testified that the police were called to her home on several occasions due to disagreements with respondent. She testified regarding a recent incident when respondent refused her access to their home and jammed her foot in the door while in the presence of respondent's older children. There was also evidence of another incident when respondent pulled her hair and threw her in into the bathtub in front of one of respondent's children. Contrary to respondent's claim, there was sufficient evidence of domestic violence on the record, and, given that some of this violence occurred in front of respondent's other children, this evidence of domestic violence and criminality served to demonstrate that his home was an unfit place for A.L. See *Matter of Miller*, 182 Mich App 70, 80; 451 NW2d 576 (1990) ("Evidence of violence between parents in front of the children is certainly relevant to showing . . . that the home is an unfit place for the children by reason of criminality or depravity."). See also *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001) ("[H]ow one parent treats one child is certainly probative of how that parent may treat other children.").

Likewise, respondent asserts that petitioner failed to prove that respondent had "difficulties with cognitive and emotional controls," and that he is "disposed towards periods of depression, anxiety, agitation, difficulty thinking, concentrating, and exercising judgment" as alleged in the petition. The evidence showed, however, that respondent had been on social security disability for mental health issues, he had been under the care of a psychologist and psychiatrist, and that, as found by the trial court, respondent had shown "agitated behavior and threatening verbal statements" to people involved with his case. By his own admission, respondent had previously been diagnosed with depression and he described himself as a

"schizo." Taken together, the evidence demonstrated that respondent had a history of mental health concerns warranting the trial court's exercise of jurisdiction.

Respondent also argues that the mother's noncompliance with her treatment plan was irrelevant to the issue of his parental fitness. This claim is likewise without merit. Respondent and the child's mother were married and living together throughout the majority of the case. So long as respondent and the mother were married, living in the same house, and planning together for family reunification, the mother's substance issues posed a risk to A. L. See MCL 712A.2(b)(2). In order for respondent to provide a fit home environment for A. L., it was necessary for him to provide a drug free home and by continuing to live with A.L.'s mother, respondent subjected A.L. to the risks posed by her mother's behavior.

Respondent also argues that the court relied on hearsay statements offered by Brda and Courtney Morgret, but he does not specify which statements he challenges. By failing to draw our attention to specific hearsay in the record, respondent has abandoned this portion of his argument. See *Yee v Shiawassee Co Bd of Com'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Moreover, Brda's testimony was based on her conversation with respondent, a nonhearsay admission by a party under MRE 801(d)(2), and her review of the file. Brda gave testimony about her first personal encounter with respondent in which he expressed inappropriate, excessive levels of anger toward Brda, noting that respondent's anger issues would likely impact his parenting skills because he was easily set off. We see nothing improper in the trial court's consideration of this evidence.

Respondent argues that the court concluded that he had an alcohol problem based on hearsay statements from caseworker Morgret. However, respondent was not prejudiced by any hearsay statement Morgret made about his alcohol use given that, during the September 30, 2013 motion hearing, respondent admitted that he formerly abused alcohol and drank beer every day. He admitted taking Suboxone for back pain and Trazadone as a sleep aid. Because respondent refused to testify at the September 12, 2014 trial (he pleaded his Fifth Amendment right against self-incrimination in response to any question asked of him), petitioner's counsel requested the court to take judicial notice of his testimony during the earlier motion hearing, which the court did, and which respondent does not challenge on appeal. Moreover, during that motion hearing, the child's mother also testified that respondent drank alcohol daily. Thus, the court's findings were not based purely on hearsay testimony, as respondent suggests.

Respondent argues that his admission regarding his alcohol use to caseworker Matt VanHoosear occurred after the petition was filed and should not be considered because, as required by MRE 402, it was not relevant to the allegations listed in the petition. The July 2014 petition alleged that respondent was an alcoholic. Thus, testimony about his use of alcohol was relevant under MRE 402, and the trial court was not prohibited from considering additional evidence gathered after the petition, particularly given that respondent could not have been surprised by the evidence as it involved his own statements to VanHoosear. See *In re Dearmon*, 303 Mich App 684, 698; 847 NW2d 514 (2014). "A fact-finder may consider evidence gathered after the events cited in the petition if that evidence is relevant to a fact of consequence flowing from that question and otherwise admissible." *Id*. Moreover, even if testimony about a specific incident occurring after the petition was filed could be considered error, such error was harmless

in view of the other evidence presented. See *In re Snyder*, 223 Mich App 85, 92-93; 566 NW2d 18 (1997). As discussed, there was sufficient evidence on the record that respondent abused alcohol.

On appeal, respondent also faults the trial court for referencing the hearing held on September 30, 2013 during its findings following the adjudication trial. In particular, respondent claims that the trial court "took liberties in paraphrasing the court's findings from the September 13, 2013 motion hearing" and conflated the two proceedings by suggesting that they were essentially addressing the "same issue." Respondent cites no law explaining why the trial court could not reference that there had been an earlier hearing at which it was determined the child should not be placed in respondent's home, and we decline to search for such authority. See *Yee*, 251 Mich App at 406. In any event, the trial court made clear findings warranting the assumption of jurisdiction following the adjudication based on the evidence presented and we see no clear error in its general reference to the earlier proceedings.

Respondent further argues that the trial court impermissibly shifted the burden of proof to respondent by commenting that respondent's failure to stay for trial was "persuasive evidence." Respondent argues that his decision to leave the courtroom did not prove that the allegations in the petition were true. Respondent's claim is unpersuasive. The trial court acknowledged the governing standard of proof when discussing its findings. And, as discussed, the petitioner met its burden of proof by a preponderance of the evidence that A. L. came within the statutory requirements of MCL 712A.2. MCR 3.972(C)(1); *In re Brock*, 442 Mich 101, 108-109; 499 NW2d 752 (1993). Respondent's refusal to stay in the courtroom and testify regarding his ability to provide a proper home environment for A. L. suggests that this was not his priority, and the trial court was not prohibited from drawing an adverse inference from respondent's decision to depart without testifying or attempting to advocate for A.L.'s placement in his home. See *In re MU*, 264 Mich App 270, 283 n 5; 690 NW2d 495 (2004). Respondent's decision to abruptly leave the courtroom partway through the trial without any explanation supports the court's finding that he was emotionally unstable and that his mental health concerns compromised his ability to provide a fit home environment. In any event, even without respondent's departure, there was sufficient evidence on the record for the court to assert jurisdiction.

Finally, respondent argues there was no evidence he used alcohol in front of the child. Even if there was no evidence that respondent drank in front of A.L., the alcohol would still have impaired his judgment and interfered with his ability to suitably parent a young child such as A.L. His daily consumption of alcohol, particularly when coupled with his mental health problems and history of domestic violence, provided a sufficient basis for the trial court's conclusion that respondent's home was an unfit place for A.L. MCL 712A.2(b)(2). Thus, the court did not err in assuming jurisdiction.

VI. EFFECTIVE ASSISTANCE OF COUNSEL

Respondent lastly argues that he was denied the effective assistance of counsel. Specifically, respondent contends counsel was ineffective for (1) failing to object to the adjudication by bench trial as opposed to a jury trial, (2) failing to object to Morgret's hearsay testimony at trial, and (3) failing to object to Brda's qualification as an expert.

In child protective proceedings, this Court will apply by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). To prevail on his claim of ineffective assistance of counsel, respondent must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). A respondent has the burden of establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Further, there is a strong presumption that counsel provided effective assistance, and a respondent bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Garza*, 246 Mich App at 255.

Respondent first claims trial counsel was ineffective for failing to object to the court's waiving of respondent's right to a jury trial or to file a motion for reconsideration of the court's ruling. However, as discussed, when respondent failed to appear for his jury trial, his attorney asked that the trial court continue with proceedings in respondent's absence, belying respondent's claim that counsel made no effort to pursue a jury trial. Despite counsel's request, the trial court reasonably refused to continue in respondent's absence. Then, after failing to appear for a jury trial, the record shows that respondent appeared to participate at his bench trial without voicing any objection or dissatisfaction on the record. On this record, we cannot conclude that respondent was averse to the bench trial, and respondent's counsel may have simply decided against again requesting a jury as a matter of trial strategy. Defendant has not overcome the presumption that counsel provided effective assistance. Moreover, given the evidence presented at trial, there is no reasonable probability that any objections or motions would have made a difference in the outcome of the adjudication portion of this case. There was clear evidence that respondent was unfit to parent. He abused alcohol, had a history of domestic violence with the child's mother with whom he lived, had mental health issues, and was emotionally unstable. Given this evidence, no reasonable jury would have found that respondent could provide proper care of the child, and thus counsel's failure to ensure a jury trial did not alter the outcome.

Respondent also argues that trial counsel was ineffective because he did not object to Morgret's hearsay statements. Decisions to object typically constitute matters of trial strategy. See *Unger*, 278 Mich App at 242. Respondent fails to provide any citation to the record or to provide any specificity with regard to which statements he believes counsel should have objected to in relation to Morgret's testimony. Absent more detail to support his claim, respondent has not overcome the presumption that counsel's decision not to object was a strategic one. Indeed, respondent in fact acknowledges in his appellate brief that "counsel made efforts to discredit Morgret's testimony during his cross-examination." Given that much of Morgret's testimony reiterated other evidence presented at trial, counsel could reasonably have concluded as a matter of strategy that it would be better to attempt to discredit her testimony than to object. And, in any event, Morgret's testimony did not affect the outcome of the proceedings because, as discussed *supra*, the court had additional reliable evidence of the history of domestic violence and respondent's alcohol use. Thus, any hearsay testimony that came in did not affect the outcome of the proceedings and respondent has not established his ineffective assistance of counsel claim.

Finally, respondent argues that trial counsel also provided ineffective assistance by failing to object to Brda being qualified as an expert witness and failing to object to her testimony regarding the ultimate issue in the case. Any objection on these grounds would have been futile, however, because, as discussed, the trial court did not err in qualifying Brda as an expert and testimony on an ultimate issue is not precluded. See MRE 702; MRE 704. Counsel is not considered ineffective for failing to raise futile objections, and thus counsel cannot be considered ineffective for failing to object to Brda's testimony. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Further, there is no reasonable probability of a different outcome if Brda had not been qualified as an expert or if she had not testified regarding her opinion on whether it was contrary to the welfare of the child to remain in the home. The majority of testimony provided by Brda was based on her personal experience with respondent and even without Brda's expert opinion, given the evidence presented, the trial court would have come to the same conclusion regarding respondent's inability to provide a suitable home environment for the child.

In sum, the evidence does not show that counsel's assistance was below the range of competence required of attorneys in these cases. The result of the proceedings would not have been different even if trial counsel had made appellate counsel's suggested objections, filed a motion for reconsideration, objected to hearsay testimony, or objected to the qualification of one of the witnesses as an expert. Thus, respondent was not deprived of the effective assistance of counsel.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Stephen L. Borrello